

On appeal, claimant contends the ALJ erred in finding that his low back injury did not arise out of and in the course of his employment. Respondent raises additional issues. Respondent argues: (1) the claimant cannot request review because no additional hearing was conducted; and (2) the issue on appeal is a question of nature and extent of disability and, therefore, not a jurisdictional question.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Order should be affirmed.

The Board concludes it does have jurisdiction to consider the issue on appeal. The fact there has been no hearing does not preclude review. The parties have submitted additional evidence and the ALJ has entered a separate order. That order is subject to appeal pursuant to K.S.A. 44-551. In addition, the issue on appeal is both a question of nature and extent and arising out of and in the course of employment. This latter issue is subject to review as a jurisdictional issue identified in K.S.A. 44-534a.

Claimant injured his neck and upper back on April 28, 1999, when a large pipe fell on his hard hat while he was working as a millwright for the respondent. Claimant was seen by Dr. Sadiq Mohyuddin and Dr. Bruce T. Vest, Jr., and was referred to Dr. Paul S. Stein. Dr. Stein performed a discectomy and fusion at C5-6 and C6-7 on October 21, 1999. During a visit with Dr. Stein on November 24, 1999, claimant complained about pain in his lower back. Although claimant testified he complained of low back problems from the beginning, November 24, 1999, approximately seven months after the accident, is the first mention of low back complaints in the medical records.

After the first preliminary hearing, claimant's counsel sought opinions from Dr. Stein and Dr. Pedro A. Murati concerning the cause of claimant's low back complaints and whether they were related to the accident of April 28, 1999. Dr. Stein responded:

Unfortunately, I really can't make a definitive statement, within a reasonable degree of medical certainty, as to what the source of his lower back pain is at the present time.

Dr. Murati saw claimant June 29, 2000, at the request of claimant's counsel. His initial report mentions, along with several other problems, low back complaints. It was his impression that claimant had lumbar radiculopathy secondary to spinal stenosis. At that time, he gave no opinion about the cause. In a second letter, one dated July 21, 2000, Dr. Murati addressed the cause issue as follows:

Certainly the accident could have aggravated a pre-existing condition to Mark's back. Regardless the accident occurred when he was on his way to surgery, therefore it is still work comp related. Barring any other accident or injuries I would say that within a reasonable degree of certainty that Mark's low back pain is a direct result from the injury that occurred on 04-28-99.

The Board concludes, as did the ALJ, that the evidence does not satisfy claimant's burden. Dr. Stein, who has treated the claimant since shortly after the accident, could not give an opinion on the cause. In context with the other evidence, Dr. Murati's opinion is not

persuasive. He did not see the claimant until over a year after the accident. His second letter gives a confusing account of the cause. He mentions an accident. There was an automobile accident, but claimant testified he was not injured in the accident. Dr. Murati then ties the low back to the April 28, 1999 accident but only states the conclusion without any explanation or support for the conclusion.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish on September 18, 2000, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: Chris A. Clements, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director